

STATE OF MICHIGAN
COURT OF APPEALS

In re WEBER Estate.

MARVIN J. WEBER and JOHN B. WEBER,
Trustees for the GERALDINE WEBER Revocable
Living Trust,

Plaintiffs-Appellees/Cross-
Appellants,

v

Estate of GERARD WEBER,

Defendant,

and

MARJORIE WEBER,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED
November 15, 2011

No. 300099
Oakland Probate Court
LC No. 2009-321762-CZ

Before: SERVITTO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant Marjorie Weber appeals as of right and plaintiffs Marvin J. Weber and John B. Weber cross-appeal from the order of the Oakland County Probate Court imposing a constructive trust over \$200,000 contained in a Fidelity brokerage account titled to Marjorie Weber. We affirm.

This appeal involves the administration of the Geraldine Weber Trust. On October 13, 1995, Gerard Weber and Geraldine Weber, husband and wife, executed and funded separate revocable living trusts: the Gerard Weber Trust and the Geraldine Weber Trust. The trusts were executed for purposes of minimizing estate tax liability and are what is commonly known as A/B trusts. The purpose of the two separate trusts was to utilize both Gerard and Geraldine's individual estate tax exemptions.

Geraldine Weber named herself the initial trustee of the Geraldine Weber Trust. Under the terms of her trust, Geraldine Weber retained broad powers to add or remove property from the trust, change the beneficiaries of the trust, amend the trust, or revoke the trust at anytime. However, upon Geraldine Weber's death, the trust became irrevocable. The successor trustee was then required to take an internal accounting of the trust estate and divide the trust estate into two separate shares. Share B, the children's trust, was to be composed of trust property having a value equal to the maximum estate tax exemption at the time of Geraldine Weber's death. Any excess trust property would go to Share A, the marital trust. If the Geraldine Weber Trust assets were equal to or less than the maximum estate tax exemption, all the trust assets would go into Share B, the children's trust.

Geraldine Weber died on March 29, 2002. Gerard Weber succeeded Geraldine Weber as trustee of the Geraldine Weber Trust. In 2003, Gerard Weber met Marjorie Weber, and the two began a relationship. Gerard Weber and Marjorie Weber married on July 27, 2007.

In April 2007, Gerard Weber withdrew \$200,000 from the Geraldine Weber Trust checking account and \$20,000 from his own personal checking account, and invested the \$220,000 in a six-month Certificate of Deposit titled to the Geraldine Weber Trust and Gerard Weber. Upon maturity, Gerard Weber withdrew the net proceeds, \$225,599.04, and deposited them into his Citizens Bank checking account, which was jointly titled between Gerard Weber and Marjorie Weber (hereafter "defendant"). Shortly thereafter, defendant withdrew \$225,000 from the Citizens Bank checking account and deposited the funds into a Fidelity brokerage account titled to Gerard and defendant. Defendant acted on the instructions of Gerard Weber.

Gerard Weber died on August 2, 2008. Prior to his death, Gerard Weber amended his own trust and added the following provision:

Settlor has also entered into several bank accounts and certificates of deposit whereby his spouse, MARJORIE WEBER, had been identified as co-owner. It is Settlor's intention that upon his death, if he is survived by his spouse, then MARJORIE WEBER shall be the lawful owner of the accounts by operation of law.

Plaintiffs succeeded Gerard Weber as co-trustees of the Geraldine Weber Trust. After discovering the above referenced transaction, plaintiffs filed suit against defendant and the Estate of Gerard Weber. Count I of plaintiffs' complaint alleged that Gerard Weber had breached his fiduciary duty to the Geraldine Weber Trust, and that defendant had been unjustly enriched by receiving funds to which she was not entitled. Count II alleged that defendant occupied a fiduciary and confidential relationship with Gerard Weber, and that she had breached her fiduciary duty by exercising undue influence over Gerard Weber. Count III alleged that defendant had wrongfully converted the funds from the joint account to herself.

The case proceeded to a bench trial.¹ The probate court found in favor of plaintiffs on Count I. The probate court found that the \$200,000 taken from the Geraldine Weber Trust was traceable to the Fidelity brokerage account titled to defendant and Gerard Weber, imposed a constructive trust over the Fidelity account, and ordered that the \$200,000 be returned to the Geraldine Weber Trust. The probate court found in favor of defendant on Count III, finding that no evidence demonstrated that she knew that she was not lawfully entitled to the funds. Defendant now appeals from the order of the probate court imposing a constructive trust.

On appeal, defendant first argues that the probate court erred when it imposed a constructive trust because there was no unjust enrichment on her part and that a constructive trust could not be imposed against her because she was an innocent party and a bona fide holder of the funds. We disagree.

We review for clear error a trial court's factual findings and review de novo its conclusions of law following a bench trial. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007); MCR 2.613. Unjust enrichment is an equitable doctrine and the imposition of a constructive trust is an equitable remedy. *Kammer Asphalt Paving Co v East China Twp Sch*, 443 Mich 176, 185-186; 504 NW2d 635 (1993); *Kent v Klein*, 352 Mich 652, 657-658; 91 NW2d 11 (1958). "[E]quitable issues are reviewed de novo, although the findings of fact supporting the decision are reviewed for clear error." *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 9; 596 NW2d 620 (1999). A factual finding is clearly erroneous "if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made." *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010).

A constructive trust is a remedial device implemented "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest[.]" *Kent*, 352 Mich at 656. A constructive trust can arise when property has been "obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property[.]" *Potter v Lindsay*, 337 Mich 404, 411; 60 NW2d 133 (1953), quoting *Racho v Beach*, 254 Mich 600, 606-607; 236 NW 875 (1931).

In this case, the probate court correctly determined that Gerard Weber did not have authority to remove the \$200,000 from the trust account. The terms of the Geraldine Weber Trust required Gerard Weber, as successor trustee, to divide the trust estate into two shares; the marital trust and the children's trust. The children's trust was to be funded up the maximum estate tax exemption. According to testimony at trial, at the time Geraldine Weber died, the maximum estate tax exemption was \$1,000,000. John Weber, successor co-trustee, testified that the value of the trust estate was less than \$1,000,000 when Geraldine Weber died. Therefore, under the terms of the trust, the entire trust estate went to the children's trusts.

¹ Count II of the complaint was dismissed prior to trial; the case proceeded to trial on Counts I and III.

Under the children's trust, Gerard Weber was a mandatory income beneficiary. Additionally, he was entitled to discretionary distributions to maintain his mode of living, and a yearly "five and five" distribution.² The \$200,000 withdrawal; however, was neither of the above. No evidence showed that some or all of the \$200,000 represented net income from the trust. There is no indication that the money was needed for Gerard Weber to maintain his mode of living. In fact, defendant concedes that Gerard Weber's trust contained substantial assets. Additionally, the trust required that the "five and five" distribution be made upon written request, and there is no evidence that Gerard Weber made a written request.

Because Gerard Weber did not have authority to withdraw the \$200,000, it must be returned to the trust.

It is . . . well settled that where money held upon trust is misapplied by the trustee and traced into an unauthorized investment in property of any nature, the investment thus made, in the absence of a claim of *bona fide* ownership by a third person, may be treated by the *cestui que trust* as made for his benefit. [*Massachusetts Bonding & Ins Co v Josselyn*, 224 Mich 159, 162; 194 NW 548 (1923).]

Here, plaintiffs traced the \$200,000 withdrawn from the Geraldine Weber Trust to the Fidelity brokerage account titled to Gerard and defendant. Although there is no indication of wrongdoing on the part of defendant, she is not bona fide owner of the funds because she never gave any value. See *Fidelity & Deposit Co of Maryland v Stordahl*, 353 Mich 354, 358-359; 91 NW2d 533 (1958). Rather, she was mere volunteer.

Wherever property, real or personal, already impressed with or subject to a trust of any kind, whether express or by operation of law, is transferred by the trustee, not in the course of executing or carrying into effect the terms of the trust, or devolves from such trustee to a third person, who is a mere volunteer, then the rule is universal that such voluntary transferee acquires and holds the property subject to the same trust which before existed, and becomes a trustee for the original beneficiary. [*Long v Earle*, 277 Mich 505, 524-525; 269 NW 577 (1936).]

Defendant contends that she cannot be held liable for the Gerard Weber's breach of any fiduciary duty because she did not participate in the breach. However, "[a] constructive trust need not arise because the property was wrongfully acquired, it may arise out of unconscionability and unjust enrichment." *Grasman v Jelsema*, 70 Mich App 745, 752; 246 NW2d 322 (1976). "Unjust enrichment is defined as the unjust retention of money or benefits which in justice and equity belong to another." *Tkachik v Mandeville*, 487 Mich 38, 47-48; 790 NW2d 260 (2010) (internal quotations and citations omitted).

² The "five and five" distribution allowed Gerard Weber, upon written request, to withdraw five percent of the principal of the trust or \$5,000, whichever was greater.

In this case, it would be unjust for defendant to retain the \$200,000. But for Gerard Weber's breach of fiduciary duty, the \$200,000 contained in the Fidelity brokerage account would have remained in the children's trust and been distributed to plaintiffs and the other beneficiaries. While defendant argues that her retention of the \$200,000 would not be unjust because plaintiffs and other beneficiaries received substantial assets from both Geraldine Weber's Trust and Gerard Weber's Trust, the existence of other assets is irrelevant. That Gerard Weber's beneficiaries received other assets does not make the monies wrongly transferred from their mother's trust any more defendant's monies.

Defendant also argues that she was not unjustly enriched because the funds she received were purposely provided to her by Gerard Weber; in consideration for which he left his own assets of equal or greater value to plaintiffs and their sisters. Therefore, defendant argues that plaintiffs suffered no damages. Defendant asserts that because of Gerard Weber's estate plan, any return of funds to the Geraldine Weber Trust would, in equity, have to be accompanied by an equal reduction in the inheritance that plaintiffs and the other beneficiaries received from Gerard Weber. There is no authority to support this argument. Had Gerard Weber placed the \$200,000 into his own trust; there would be no damage to the beneficiaries (other than possible estate tax implications) because that money would pass to them under the terms of the Gerard Weber Trust. Gerard Weber, however, did not put the \$200,000 into his own trust. The net result of the transaction was that plaintiffs and the other beneficiaries were denied \$200,000 to which they otherwise would have been entitled. Therefore, the probate court properly imposed a constructive trust over the \$200,000.

Next, defendant argues that the probate court erred when it imposed a constructive trust over the entire \$200,000 removed from the Geraldine Weber Trust. According to defendant, the probate court should have reduced the trust by a minimum of \$41,883.91 because Gerard withdrew \$41,883.91 from a CD registered to the Gerard Weber Trust and deposited the proceeds into the Geraldine Weber Trust. Accordingly, defendant contends that these funds would have gone into the marital trust and Gerard Weber would thus have had unlimited discretion to remove them.

Attorney Knauf, the attorney who drafted the declaration of trust, testified that the children's trust was fixed in time and space and did not contemplate post-death contributions. Based on this testimony, the probate court could have found that the \$41,883.91 deposit was part of the marital trust and not subject to the children's trust. However, at the time of Geraldine Weber's death, her trust estate contained a promissory note from Gerard Enterprises, Inc., which was owned by Gerard Weber. While there is no evidence in the record regarding the value of the note or that the \$41,883.91 deposit was payment on the note, it is not an unreasonable inference given the circumstances. Attorney Knauf testified that any payments made on the note would be a trust asset. And, as previously noted, the entire trust estate was allocated to the children's trust because the trust estate did not exceed the maximum estate tax exemption of \$1,000,000. Moreover, "[i]f the trustee commingles trust funds with his own, the entire commingled property 'will be treated as subject to the trust [...] except in so far as the trustee may be able to distinguish and separate that which is his own.'" *Long*, 277 Mich at 526 (citation omitted). Under these circumstances, the probate court's determination that the \$41,883.91 was a trust asset is not clearly erroneous.

Defendant also argues that the probate court improperly relieved plaintiffs of their burden to show which part of the \$200,000 came from the children's trust and which part was attributable to trust income and the "five and five" distribution. Gerard Weber was mandatory income beneficiary of the children's trust. Additionally, he was allowed, upon written request, to take a yearly distribution of five percent of the trust principle, or \$5,000, whichever was greater. Defendant argues that part of the \$200,000 consisted of trust income and the "five and five" distribution, and that it was plaintiffs' burden to show which part of the sum came from the children's trust. We disagree.

As previously noted, "[i]f the trustee commingles trust funds with his own, the entire commingled property 'will be treated as subject to the trust [...] . . . except in so far as the trustee may be able to distinguish and separate that which is his own.'" *Long*, 277 Mich at 526. Gerard Weber never made a written request for a "five and five" distribution; therefore, none of the \$200,000 was attributable to a "five and five" distribution. In regards to trust income, Gerard Weber should have taken trust income out of the trust; however, he did not. He made no attempt to account for trust income or otherwise distinguish between the children's trust and the marital trust. The trust income was commingled with the trust principal.

On cross-appeal, plaintiffs argue that the constructive trust should have extended to the interest earned on the money after it was wrongfully removed from the trust and until it is returned. However, this issue was not raised before and decided by the trial court. Thus we need not, and decline to, address it for the first time on appeal. See, *Polkton Charter Tp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens